1996

The State of Utah v. Ted Charles Hansen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
TED CHARLES HANSEN,	:	Case No. 960516-CA Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction of Unlawful Distribution, Offering, Agreeing, Consenting, or Arranging to Distribute a Controlled Substance, Cocaine, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1994), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David S. Young, Judge, presiding.

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JURISDICTIONAL STATEMENT

This is an appeal by a criminal defendant from judgment of conviction entered July 15, 1996. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF THE ISSUES, STANDARDS OF REVIEW AND PRESERVATION OF THE ISSUES

ISSUE I: Did Instruction 22 stating that "any act in furtherance of arranging to distribute a controlled substance is a criminal offense" allow the jury to convict Hansen without finding that he had the requisite statutory intent?

STANDARD OF REVIEW: The trial court's jury instructions on the elements of a crime are reviewed under a correctness standard. State v. Gibson, 908 P.2d 352, 354 (Utah Ct. App. 1995).

PRESERVATION OF ISSUE: Defense counsel objected to the admission of Instruction 22 on the grounds that it reduced the burden of proof the State had to meet because it did not accurately state the actus reus or mens rea of the offense. R. 623.

ISSUE II: Did Instruction 21 incorrectly define the actus reus of arranging to distribute a controlled substance?

STANDARD OF REVIEW: The appropriate standard of review for a trial court's interpretation of statutory law and the propriety of jury instructions is correction of error. State v. James, 819 P.2d 781, 796 (Utah 1991); State v. Brooks, 833 P.2d 362, 363-64 (Utah Ct. App. 1992).

PRESERVATION OF ISSUE: Defense counsel objected to the admission of Instruction 21 on the grounds that the definition of "arranging" was incorrect, over broad, and in conflict with State v. Scott, 732 P.2d 117 (Utah 1987). R. 622-23.

ISSUE III: Was there sufficient evidence to sustain Hansen's conviction of arranging to distribute cocaine?

STANDARD OF REVIEW: This Court will reverse a criminal case for insufficient evidence only when the evidence, viewed in the light most favorable to the verdict, is "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." State v. Petree, 659 P.2d 443, 444 (Utah 1983).

PRESERVATION OF ISSUE: After the close of the State's case, defense counsel moved to dismiss on the grounds that the State had failed to make a prima facie showing that Hansen had arranged to distribute cocaine. R. 569-75.

ISSUE IV: Did the trial court err by admitting evidence of Hansen's statements to undercover FBI agents that he knew people who could sell them other controlled substances under

Rules 404(b) and 403 to prove intent?

STANDARD OF REVIEW: The trial court's decision to admit evidence under Rule 404(b) is reviewed with "very limited deference, according it a relatively small degree of discretion." State v. Doporto, 308 Utah Adv. Rep. 18, 20 (Utah 1997). Though the issue is not reviewed de novo, the trial court's justification for admitting evidence under 404(b) will be closely reviewed. Id.

PRESERVATION OF ISSUE: Defense counsel filed a motion in limine to exclude evidence of Hansen's statements to undercover agents regarding his ability to procure controlled substances. R. 28-30. A hearing was held on May 1, 1996 where defense counsel argued that the evidence was not admissible under Rules 404(b) and 403. R. 218-219.

TEXT OF DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The text of the following relevant constitutional provisions, statutes and rules is contained in Addendum A:

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

Article I, Section 7 of the Utah Constitution

Utah Code Ann. § 58-37-8(1)(a)(ii) (1994)

Utah Code Ann. § 76-2-202 (1995)

Rule 403, Utah Rules of Evidence

Rule 404(b), Utah Rules of Evidence

STATEMENT OF THE CASE

Hansen was convicted after a two-day jury trial of

Unlawful Distribution, Offering, Agreeing, Consenting, or Arranging to Distribute a Controlled Substance, Cocaine, a second degree felony in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1994), in the Third Judicial District Court for Salt Lake County. On July 15, 1996, Judge David S. Young sentenced Hansen to serve a term of one to fifteen years at the Utah State Prison.

FACTS

On August 2, 1994, Ted Hansen ("Hansen") accompanied Thomas Walker ("Walker") and Tim Ingram ("Ingram"), a paid government informant, to 1063 East 3300 South in Salt Lake County. Unknown to Hansen and Walker, FBI agents had hidden a video camera at the site to record conversations between themselves, Hansen, Ingram, and Walker.[1] R. 477-79, 487. Ingram did not testify. Though the FBI had paid Ingram $1,000 for his cooperation, they did not know his whereabouts at the time of trial. R. 516. When Hansen and Walker arrived, Agent Vince Garcia ("Garcia") asked them if they were wearing wires or had weapons outside the door and demonstrated to them that he was not wearing a wire by pulling up his shirt. R. 558.

Once inside, Agent Richard Rasmussen ("Rasmussen") offered Hansen a beer, telling him he was a concrete contractor

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[1]. The entire incident was video taped. A partially redacted copy of the video was submitted into evidence by the State. There is no written transcript of the video. However, in the left hand corner of the video a clock is running. Appellant will refer to the video tape as "VT" when citing to facts that are contained in the video. The numbers appearing after citations to the video refer to the time on the video where the reference can be found.

who needed employees for a project at the airport. R. 477, 489-90, 493; VT. 10:22-24. Hansen and Walker were both unemployed and had experience in concrete work. R. 535-37. Both expressed an interest in obtaining employment from the agents' phony concrete company. Hansen gave Rasmussen his correct name, telephone number, social security number, and job references in hopes of obtaining employment. R. 508-510, 563-64; VT. 10:28. Rasmussen then told Garcia to get job applications for Hansen and Walker. Rasmussen told Hansen and Walker he would put them in touch with his foreman. VT. 10:29. Walker left the room briefly, during which time Hansen continued to talk about his work experience. VT. 10:31.

After giving employment information to the agents, Walker and Ingram began discussing with the agents the sale of cocaine. VT. 10:32-34. Walker and Ingram agreed to obtain $480 worth of cocaine for the agents. Hansen was not involved in the negotiations. He never handled the cocaine or made assurances about its quality. VT. 10:32-34, 11:16-33; R. 564-65. Hansen was not given any of the money. VT. 10:32-36; R. 565-66.

After Walker had negotiated the price, Rasmussen asked who had driven. VT. 10:34. When Hansen indicated he had driven, Rasmussen told Hansen to stay behind. Hansen gave his keys to Walker and remained with Rasmussen and Garcia. VT. 10:34. Contrary to Rasmussen's testimony, there was no indication that Hansen was originally supposed to bring back the cocaine. R. 524; VT. 10:34. Ingram took the money. VT. 10:34. Walker

told the agents that they should "take care of" Ingram by each giving him a half gram of the cocaine. VT. 10:35. After Walker and Ingram left, Rasmussen offered Hansen another beer. VT. 10:36-37.

While Hansen was waiting for Walker and Ingram to return, the agents asked Hansen if he sold drugs. VT. 10:39. Hansen said that he knew people that sold drugs, mainly LSD and marijuana, and that he had sold marijuana in the past. VT. 10:39. While they were waiting for Walker, Rasmussen asked Hansen if he could trust Walker. VT. 10:40. Hansen assured him he could. VT. 10:40. Garcia asked Hansen if he did business with Walker. VT. 10:40. Hansen said no, but indicated that Walker did not have a car. Hansen said he did not ask for anything in exchange for giving Walker rides. VT. 10:40.

When asked how he made a living, Hansen replied that he was a carpenter. VT. 10:40. The agents asked Hansen if he could get them drugs. VT. 10:41. Hansen said he might be able to get LSD, but would have to contact a third party first. VT. 10:41-43. Hansen again brought up his work experience. VT. 10:49. Hansen also told the agents he could get them marijuana. VT. 11:09-10. Rasmussen gave Hansen another beer, and asked Hansen how much he made "doing this" and asked if "this" wasn't helping him pay the bills. Hansen said no. VT. 11:01-04. Hansen again stated that he was just looking for a job. VT. 11:04.

Rasmussen began to complain about the time. VT. 11:07.

Hansen said he knew where Walker was going and that Walker had to page someone to meet him. Hansen said he wasn't sure whether Walker had set up a deal before hand, but that he knew the people Walker dealt with did not like anyone coming to their house. VT. 11:07-08. When Walker returned, he indicated that he had "another customer" and that there was someone else he had to go with. VT. 11:16. Walker commented on the high quality of the cocaine. VT. 11:17. When the cocaine turned out to be a quarter gram light, Walker called to complain. VT. 11:17. Walker again indicated that Ingram should be compensated, but did not mention compensating Hansen. In fact, the agents and Walker joked that Hansen was the only one not getting compensated. VT. 11:27-28.

Walker testified that Hansen did not plan or participate in the cocaine deal. R. 538. Walker told the jury that he and Ingram initiated the deal for their own profit. R. 536. Walker's intent in contacting Hansen that morning was to bring him to the site to find work as Ingram had told Walker that his "boss" might be hiring. R. 535-37. Walker did not tell Hansen about the arrangement he had made with Ingram to sell the agents cocaine prior to arriving. R. 537.

Hansen never produced any controlled substances for the agents. He never took any money from the agents, nor did he take the agents to anyone who did sell drugs. R. 519, 566. When Garcia called Hansen that night, Hansen did not want to talk to him, told him he could not get him any LSD, and hung up. R. 562-63.

Hansen filed a motion to suppress or redact those portions of the videotape that were unrelated to this specific cocaine transaction. R. 28-30. The trial court allowed Hansen's statements that he knew people who sold LSD and marijuana and might be able to get drugs for the agents under Rule 404(b), Utah Rules of Evidence to prove intent. R. 223-25.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error when it instructed the jury that "any act in furtherance of arranging to distribute a controlled substance is a criminal offense pursuant to statute." Instruction 22 incorrectly stated the actus reus of the offense and allowed the jury to convict without finding that Hansen had the requisite intent in violation of due process of law. The error was not cured by the admission of a correct Elements Instruction because the Elements Instruction irreconcilably conflicted with Instruction 22. Because there is no way of knowing whether the jury relied upon the Elements Instruction or Instruction 22 to convict, reversal is required.

The jury was not given an accurate description of the elements of the offense of arranging to distribute a controlled substance. Instruction 21's definition of "arranging" is an incorrect statement of the law. The definition of "arranging" provided to the jury is in conflict with case law. Hansen was prejudiced because the erroneous definition broadened the scope of the actus reus of the arranging statute beyond its intended reach.

There was insufficient evidence to establish that Hansen arranged the distribution of cocaine. The fact that Hansen drove Walker to the undercover agent's office and loaned Walker his car at the request of the agents did not establish that he arranged the deal. Hansen did not negotiate the price, handle the drugs, or receive compensation. There was not sufficient evidence to establish that Hansen had the requisite intent. The agents posed as concrete contractors who were looking for workers, and it was clear that Hansen accompanied Walker in the hopes of finding employment.

The trial court committed reversible error by admitting evidence under Rule 404(b) of discussions Hansen had with the agents while Walker was gone about his ability to procure other drugs not charged as part of the Information. The evidence was not necessary to the State's case. It was not highly probative of Hansen's intent to arrange the deal between Walker and the agents. It was unclear whether Hansen had the ability or the intent to actually procure other drugs for the agents, and in fact Hansen never followed through with his claim. Lastly, the prejudicial effect of the evidence substantially outweighed its probative value. The error was not harmless because it cannot be said with any assurance that the jury was not influenced by the evidence.

ARGUMENT

POINT I: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUBMITTING A JURY INSTRUCTION WHICH ALLOWED THE JURY TO CONVICT WITHOUT FINDING THAT HANSEN HAD THE REQUISITE INTENT.

The trial court committed reversible error when it instructed the jury that Hansen was guilty of a "criminal offense by statute" if he engaged in any act which furthered the distribution of drugs regardless of his intent. Instruction 22 is constitutionally infirm because it allowed the jury to convict without finding all of the elements of the offense. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Hansen was prejudiced because Instruction 22 left out the element of intent, and lack of intent was Hansen's only defense. Even though the jury was given a correct Elements Instruction, the error was not cured because there is no way of knowing whether the jury relied upon the Elements Instruction or Instruction 22 to convict.

A. Instruction 22 Is Constitutionally Infirm Because It Stated That Hansen Could Be Found Guilty Of Arranging To Distribute Drugs Regardless Of His Intent.

The State submitted, over defense counsel's objection, the following Instruction:

> Under the law in the State of Utah any act in furtherance of arranging to distribute a controlled substance is a criminal offense pursuant to statute.

The text of Instruction 22 was lifted out of context from State v. Harrison, 601 P.2d 922, 923-24 (Utah 1979), and has been quoted in subsequent cases dealing with claims of insufficient evidence to establish the crime of arranging to distribute a controlled substance. See, e.g., State v. Gray, 717 P.2d 1313, 1321 (Utah 1986).

An elements instruction using the language of the applicable statute is in most cases sufficient to explain to the jury the nature of an offense. People v. Wadley, 890 P.2d 151, 155 (Colo. Ct. App. 1994). The use of an excerpt from a court opinion to embellish the statutory definition of an offense is generally disfavored. Id. Using an excerpt from an opinion as a jury instruction is an unwise practice because an appellate opinion and jury instructions have very different purposes. Language from an opinion may be a correct expression of the law in that context, but may not translate with clarity into jury instructions. Evans v. People, 706 P.2d 795, 800 (Colo. 1985); People v. Colantuono, 865 P.2d 704, 714 (Cal. 1994).

This case presents a perfect example of the pitfalls of lifting a few phrases from an appellate opinion and turning them into a jury instruction. The State drafted Instruction 22 by directly quoting a phrase from Harrison. Harrison dealt with the issue of whether the arranging to distribute a controlled substance statute was unconstitutionally vague.[2] 601 P.2d at 923-24. Harrison held that even though the statute did not specify what kinds of acts constitute arranging to distribute drugs, because the actor must intend the distribution or sale of a controlled substance, there can be no confusion as to whether

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[2]. Prior to 1987, arranging to distribute a controlled substance was a separate offense under Utah Code Ann. § 58-37-8(1)(a)(iv) (1986). The same language of that statute has been combined with the distribution statute under Utah Code Ann. § 58-37-8(1)(a)(ii). This stylistic change does not alter the substance of the holding in Harrison.

his conduct is criminal or not. Id. The Harrison court compared the arranging statute to conspiracy statutes which are not unconstitutionally vague even though they do not define the actus reus because the actor must intend to commit a crime. Id. at 924. The court went on to state:

> Likewise, in the present situation, the citizen is put on notice by the statute that, if he intends the distribution for sale of a controlled substance, any act in furtherance of an arrangement therefor constitutes the criminal offense described by the statute.

Id. (emphasis added).

Ironically, the State's instruction left out the most important language of the Harrison opinion, the language which focused on intent. As written, Instruction 22 states that any act in furtherance of distribution of a controlled substance is a criminal offense. Stated that way, the definition of arranging suffers from the very constitutional infirmity the Harrison court sought to avoid by focusing on the importance of proving that the actor intended to illegally distribute drugs.

Under Instruction 22, if a parent loaned his car to his teenage son, and the son subsequently used the car to deliver drugs to a buyer without his parent's knowledge, the parent would have committed "a criminal offense pursuant to statute." In this case, if the jury followed Instruction 22, the undercover FBI agents and the paid informant would also be guilty of distributing a controlled substance. This is clearly not a correct statement of the law. Harrison, 601 P.2d at 923-24; Utah Code Ann. § 58-37-8(1)(a) (1994).

"An accurate instruction upon the basic elements of the offense charged is essential." State v. Laine, 618 P.2d 33, 34 (Utah 1980); State v. Jones, 823 P.2d 1059, 1061 (Utah 1991); State v. Souza, 846 P.2d 1313, 1320 (Utah Ct. App. 1993). Due process requires that the jury find beyond a reasonable doubt each essential element of the offense. Winship, 397 U.S. at 364, 90 S.Ct. at 1073. Failure to include the intent element is reversible error. Laine, 618 P.2d at 34. Instruction 22 is constitutionally infirm because it told the jury that they could find that Hansen had committed the crime of arranging to distribute drugs without determining the necessary intent element. Id.

B. The Inclusion Of A Correct Elements Instruction Does Not Cure The Error In Submitting Instruction 22.

Instruction 22, though incorrect, cannot be viewed in isolation from the other instructions. In this case, the jury was provided with a correct Elements Instruction. The Elements Instruction does not, however, cure the error. If the jury instructions, considered in their entirety, correctly state the law, an incorrect phrase or paragraph standing alone will not constitute reversible error. But if two instructions are in direct conflict, and one is clearly prejudicial, the conviction must be reversed because the jury may have followed the incorrect instruction. Cooper v. North Carolina, 702 F.2d 481, 483 (4th Cir. 1983).

For example, in Francis v. Franklin, 471 U.S. 307, 325,

105 S.Ct. 1965, 1977 85 L.Ed.2d 344 (1985), the Court held that an instruction which created an unconstitutional presumption that the defendant had the requisite intent was not cured by a general instruction which stated that intent cannot be presumed.

> Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.

Id. at 321, 1975. This principle has been consistently applied by Utah courts as well. See, e.g., State v. Chambers, 709 P.2d 321, 326 (Utah 1985); State v. Hendricks, 258 P.2d 452, 453 (Utah 1953).

C. Because Instruction 22 And The Elements Instruction Irreconcilably Conflict, There Is No Way Of Knowing Which One The Jury Relied Upon To Convict.

In this case, Instruction 22 and the Elements Instruction are in direct conflict. Instruction 22 does not merely define the element of arranging for the jury, it goes further and instructs the jury that it is a crime to commit any act which furthers the distribution of drugs. Given the fact that they are instructed to "consider all the jury instructions as a whole, and to regard each in the light of all the others," reasonable jurors would conclude that the "criminal offense pursuant to statute" described in Instruction 22 refers to the charged crime. R. 107.

Instruction 22 is cast in the language of command. It clearly sets forth the basis for a criminal conviction independent of the Elements Instruction. The Elements

Instruction told the jury they must find that Hansen intended to arrange to distribute drugs to convict. Instruction 22 told them that intent was not a requirement to convict; that Hansen's actions alone constituted a crime. There is no qualifying language or explanatory instruction indicating which instruction the jury should consider. Ultimately, the jury was left to choose which instruction to follow. As a matter of logical necessity, they had to disregard one in order to comply with the other. If they obeyed the Elements Instruction which required intent, they had to ignore Instruction 22. If they chose to follow Instruction 22 which did not require intent, they had to ignore the Elements Instruction.

This case presents the reverse side of the issue confronted by the court in Laine. In Laine, the Elements Instruction failed to include the requisite intent element, but an "Information" instruction which gave the statutory definition of the offense included the necessary intent element. Id. at 35. Laine held that the failure to include the intent element in the Elements Instruction was reversible error. Id. The court rejected the State's argument that the error in the Elements Instruction was cured by an "Information" instruction that included the necessary intent element. Id.

Here, the Elements Instruction was correct and included the intent element, but the "Information" instruction left out the necessary mens rea. The Laine court focused on the fact that the Information Instruction did not say that the State had to

prove every element of the offense beyond a reasonable doubt. Id. Because the court found this difference sufficient to reverse the conviction, the court did not need to address the problem of giving the jury two contradictory instructions. This is precisely the issue presented in United States v. Perez, 43 F.3d 1131, (7th Cir. 1994).

In Perez, the jury was given two instructions on the elements of assault with intent to commit murder. The Elements Instruction correctly stated that the government had to prove intent to kill. An Information Instruction, however, stated that the government did not need to prove specific intent to kill. Id. at 1134-35. The Perez court concluded that the Information Instruction permitted the jury to convict without determining that the defendant had the requisite intent. Id. at 1138. Because the Information Instruction was directly contradictory to the Elements Instruction, it had the effect of eliminating the intent element necessary for a conviction. The overall result was a failure to instruct the jury on all of the elements of the offense. Id. at 1139. The court concluded that because the error affected the integrity of the proceeding itself, reversal was required. Id. at 1140.

D. The Failure To Properly Instruct The Jury On The Element Of Intent Cannot Be Harmless Error.

When an instruction leaves the jury with an erroneous impression of the law regarding a principal issue in the trial, reversal is required. State v. Potter, 627 P.2d 75, 80 (Utah 1981). The failure to provide an accurate instruction on the

elements of an offense is "reversible error that can never be considered harmless." State v. Jones, 823 P.2d 1059, 1061 (Utah 1991) (quoting State v. Roberts, 711 P.2d 235, 239 (Utah 1985)).

Instruction 22 deprived Hansen of his only defense. If the jury followed Instruction 22 and ignored the Elements Instruction then Hansen's intent was irrelevant and the State's instruction was tantamount to a directed verdict. See, e.g., State v. Panter, 688 F.2d 268, 270 (5th Cir. 1982). Instruction 22 left the jury with the unmistakable impression that a lack of criminal intent could have no effect on the criminality of his conduct. There was little dispute as to Hansen's actions as the entire incident was captured on video tape. Intent was the critical issue in Hansen's trial. The crucial question the jury was required to answer was whether Hansen intended to arrange to distribute cocaine, or whether despite his knowledge of the drug deal, his intent was not to arrange drug deals, but to try to find a job. If the jury was properly instructed, they could have found that Hansen gave Walker a ride because he wanted to apply for work. They could have concluded that Hansen stayed behind and gave his keys to Walker simply because the man he was hoping would hire him to do concrete work told him to stay behind.

Because the Elements Instruction irreconcilably conflicted with Instruction 22, there is no way of knowing if all or part of the jury relied on Instruction 22 to convict Hansen and reversal is required. Chambers, 709 P.2d at 326; Hendricks,

258 P.2d at 453.[3]

POINT II: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY SUBMITTING TO THE JURY AN INSTRUCTION WHICH INCORRECTLY DEFINED ARRANGING TO DISTRIBUTE A CONTROLLED SUBSTANCE.

At the State's request, the trial court submitted Instruction 21 which states in part:

> "Arranging" means any witting or intentional lending of aid in any form of any act in furtherance of aiding in the distribution of controlled substances.

Like Instruction 22, the State's definition of "arranging" was also taken out of context from Harrison. 601 P.2d at 923. "Ordinarily, non-technical words of ordinary meaning should not be elaborated upon in the instructions given by the court. It is presumed that jurors have ordinary intelligence and understand the meaning of ordinary words." State v. Day, 572 P.2d 703, 705 (Utah 1977). If the court is compelled to supply a definition of an ordinary word, the dictionary is a far better choice than a phrase taken out of context from an appellate decision. Souza, 846 P.2d at 1320; Evans, 706 P.2d at 800; Colantuono, 865 P.2d at 714.

Cases like Harrison and its progeny are intended to deal with a specific issue and fact situation. Harrison held that the arranging to distribute a controlled substance statute was not unconstitutionally vague. 601 P.2d at 923-24. In arriving at

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[3]. Instruction 22 also incorrectly defines the actus reus of arranging to distribute a controlled substance for the reasons set forth in Point II of this brief. As indicated in Point II, this error was prejudicial and requires reversal.

the conclusion that the statute gave adequate notice, the court stated:

> The statute in question accomplishes this by specifying that any activity leading to or resulting in the distribution for value of a controlled substance must be engaged in knowingly or with intent that such distribution would, or would be likely to, occur. Thus, any witting or intentional lending of aid in the distribution of drugs, whatever form it takes, is proscribed by the act.

Id. at 924.

The cases quoting this language from Harrison all deal with sufficiency of the evidence claims. Those cases stand only for the proposition that the facts in each case were sufficient as a matter of law to sustain the conviction. The Harrison opinion has given appellate courts a helpful guideline in making that determination, but was never intended to provide a working definition of the word "arrange" for purposes of a jury instruction. Given the context in which this phrase was written, it is a correct statement of the law. However, taken out of that factual and procedural context, the quoted phrase does not translate into an accurate jury instruction. Just because an appellate court found sufficient evidence to sustain a conviction in a given case does not mean that it is appropriate or desirable to borrow the broad language used by the court to reach that decision to replace the common sense meaning of the word "arrange."[4]

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[4]. Webster's New World Dictionary, 2nd. Ed. defines "arrange" as "to make ready; prepare or plan; to arrive at an agreement about; settle to come to an agreement with a person about a thing."

A. The Definition Of "Arranging" In Instruction 21 Is Incorrect Because It Describes An Actus Reus That Is Broader Than Intended By Statute.

By taking the language from Harrison out of context and using it as a definition, the State has created a very broad quasi party liability to the offense of distributing a controlled substance. The State's definition of "arranging" in essence describes a form of aiding and abetting. The State's definition makes anyone who "lends aid in any form" to one who distributes a controlled substance guilty of distribution. The State's definition of "arranging" is broader than the intended statutory meaning and is in conflict with State v. Scott, 732 P.2d 117 (Utah 1987).

In Scott, the court held that § 58-37-19 and § 76-1-103(1) prevented the State from charging a defendant with aiding and abetting in the distribution of a controlled substance.[5] Id. at 120. The court reasoned that if culpable conduct is specifically defined by the Controlled Substances Act, and if the definition of an offense in the Act was in conflict with the definition of an offense in the criminal code, the Controlled Substances Act took precedence. Id. at 120. Scott argued that the aiding and abetting statute was in conflict with the arranging to distribute statute, and he should have been charged

[5] Section 58-37-19 was repealed in 1992.

with arranging rather than as a party to distribution.[6] The court agreed.

> Although the penalty for aiding and abetting would be the same as the penalty for arranging to distribute, the offenses defined under the aiding and abetting statute are different from those defined under the arranging section.

Id. at 120. The court held that the actus reus for aiding and abetting in the distribution of drugs was different and broader than for arranging to distribute drugs. Id. Because the actus reus of "arranging" to distribute drugs was more specific than, and in conflict with, aiding in the distribution of drugs, the Controlled Substances Act took precedence and it was reversible error to instruct the jury on party liability. Id.

The State's definition of "arranging" is in direct conflict with Scott because it essentially creates a broad form of aiding and abetting. If "arranging" to distribute were by definition the equivalent of "lending aid" in the distribution of drugs, then the result in Scott would have been different. The court would have found that no conflict existed between the two statutes and Scott's conviction would have been affirmed. The State's definition of "arranging" cannot be squared with Scott.[7]

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[6]. As noted above, prior to 1987 arranging to distribute a controlled substance was a separate offense under Utah Code Ann. § 58-37-8(1)(a)(iv) (1986). The same language of that statute has been combined with the distribution statute under Utah Code Ann. § 58-37-8(1)(a)(ii).

[7]. In State v. Pelton, 801 P.2d 184, 186 (Utah Ct. App.) the court in dicta stated that Harrison provided a legitimate definition of "arrange." This opinion was not central to the holding in Pelton which was that Harrison did not render the arranging statute unconstitutionally vague. To the extent that

B. Hansen Was Prejudiced By Instruction 21 Because It Was Misleading And Incorrectly Stated The Scope Of Conduct Punishable Under The Statute.

It is crucial that the jury receive accurate instructions on the elements of an offense. Laine, 618 P.2d at 34; Jones, 823 P.2d at 1061; Souza, 846 P.2d at 1320. Instruction 21 is confusing, misleading, and incorrectly stated the law. Instruction 21 stated that any "lending of aid in any form of any act in furtherance of aiding" established the actus reus of arranging to distribute drugs. This language is confusing nearly to the point of being nonsensical. The instructions never define "aid" so the State's definition of "arranging" is potentially even broader than the aiding and abetting statute. The State's instruction was misleading because it precluded the jury from applying the more specific, ordinary, common sense definition of the term "arranging" to the facts of the case.

The jury was asked to decide whether Hansen "arranged" to distribute drugs by driving Walker to the office and, at the undercover FBI agent's request, remaining while Walker took his car to buy the cocaine. The prosecutor argued to the jury that under Instruction 21, that conduct was sufficient to convict because "doing anything in furtherance of the distribution of cocaine" constitutes "arranging" under the statute. R. 589-590. The ordinary meaning of "arranging" requires a much more active role. Had the jury been allowed to apply the plain meaning of

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Pelton adopts the Harrison opinion as a definition of "arranging," it is in conflict with Scott.

the statutory terms to the case, they would have concluded that Hansen's passive role did not rise to the level of arranging to distribute cocaine.

POINT III: THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT HANSEN'S CONVICTION OF ARRANGING TO DISTRIBUTE COCAINE.

The evidence in this case was insufficient to support a conviction under Utah Code Ann. § 58-37-8(1)(a)(ii) (1994).[8] There was no evidence that Hansen distributed, agreed, consented, or offered to sell the cocaine. Hansen did not participate in the negotiations for the drug sale, did not accompany Walker to make the purchase, did not handle the drugs or the money, and did not profit from the transaction. VT. 10:32-36, 11:16-33; R. 564-66. Hansen was not charged as a party. In order to convict, the

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[8]. In order to establish a challenge of insufficient evidence, the appellant must marshal all the evidence supporting the verdict, including all reasonable inferences drawn therefrom, and demonstrate it is legally insufficient. State v. Gray, 851 P.2d 1217, 1225 (Utah Ct. App. 1993). The evidence supporting the conviction was as follows:

1. Hansen gave Walker a ride to the agents' office.
2. After Hansen arrived, it was apparent that Walker was in the process of selling cocaine to the agents.
3. Hansen loaned his car to Walker knowing that Walker was going to obtain cocaine for the agents.
4. At Rasmussen's request, Hansen stayed behind.
5. Hansen said he knew where Walker was going, and that he may have to make a phone call to obtain the cocaine.
6. Hansen told the agents he could obtain other drugs for them.

A full account of the facts can be found in the Facts section of this Brief.

jury had to find that Hansen "arranged" to distribute cocaine.[9]

Hansen's involvement was limited to providing Walker with a ride, and allowing Walker to use his car to make the purchase. Though Hansen did stay behind as "collateral" while Walker purchased the cocaine, he stayed at Agent Rasmussen's request. VT. 10:34. Hansen's statement that he knew where Walker was going establishes that he knew something about Walker's illegal activities. VT. 11:07-08. However, Hansen's knowledge of Walker's criminal conduct does not establish that Hansen arranged the transaction between the agents, Walker, and Ingram. Hansen's knowledge that a crime was taking place coupled with his presence would not even suffice to establish accomplice liability, let alone the more narrow offense of arranging to distribute drugs.

> An accomplice is a person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of the crime. The cooperation in the crime must be real, not merely apparent. Mere presence combined with knowledge that a crime is about to be committed or a mental approbation while the will contributes nothing to the doing of the act, will not of itself constitute one an accomplice.

State v. Fertig, 233 P.2d 347, 349 (Utah 1951). As explained in Point II of this Brief, the term "arranging" is not synonymous with aiding and abetting.

Additionally, it is clear from the video tape that Hansen accompanied Walker to try to find work. R. 535-38. He gave the agents his correct name, social security number, address, phone

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[9]. As a result of this incident, Walker plead guilty to attempted distribution of cocaine. R. 533-34. Ingram took the FBI's money and disappeared. R. 516.

number, and job references. R. 508-10, 563-64; VT. 10:28, 10:31. The most that could be inferred from the evidence was that Hansen knew that Walker was selling cocaine to the agents, and he knew that Walker was using his car to purchase the drugs. This was not sufficient evidence to establish that Hansen arranged for the distribution of the cocaine.

A review of prior cases shows that there must be evidence that the defendant played an instrumental part in arranging the distribution of a controlled substance to sustain a conviction. For example, in Pelton, the defendant told an undercover agent that he would take him to a location where another man would sell him cocaine. 801 P.2d at 185. The defendant took the agent to the location and the deal was later consummated when the defendant was not present. Id. The court held that there was sufficient evidence to convict the defendant of arranging to distribute a controlled substance because he "knew that he would be the triggering mechanism" which eventually led to the sale of cocaine. Id. The "Defendant acted knowingly and intentionally, and he was instrumental in arranging the sale of the cocaine." Id. at 186.

The Pelton court's reasoning reflects the holdings of other cases involving arranging to distribute a controlled substance. In all those cases, the defendant's actions were instrumental in setting up the sale of the drugs. In all those cases, the defendant played a vital role by preparing, planning, or making possible the eventual transaction. See, e.g., State v.

Ontiveros, 674 P.2d 103, 103-104 (Utah 1983) (evidence sufficient where defendant took informant to seller's house, collected the money, and purchased the drugs for the informant); State v. Clark, 783 P.2d 68, 68-70 (Utah Ct. App. 1989) (evidence sufficient where defendant told the informant the cocaine was of good quality and that he and the other dealer were partners, made attempts to contact the seller, and warned the informant when they were followed); State v. Gray, 717 P.2d 1313, 1321 (Utah 1986) (evidence sufficient where defendant drove the seller to another house where the drugs were purchased, divided the drugs between herself and the informant, and told the informant the drugs were of good quality).

Walker's use of Hansen's car to buy the cocaine for the undercover agents does not establish that Hansen was "instrumental" in arranging the cocaine deal between Walker and the agents. Walker negotiated the deal to sell the cocaine without the assistance of Hansen or his car. There was no evidence that Hansen introduced the undercover agents to Walker for the purpose of arranging a drug buy. In fact, Walker testified that the only reason Hansen accompanied him to the site was to try to get work. R. 535-37. Lastly, Hansen never encouraged the sale by discussing the quality of the drugs or the price. Because the evidence was insufficient to establish that Hansen arranged to distribute cocaine, his conviction should be reversed.

POINT IV: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE OF HANSEN'S DISCUSSIONS WITH UNDERCOVER AGENTS ABOUT HIS ABILITY TO PROCURE OTHER DRUGS NOT RELATED TO THE CHARGED CRIME UNDER RULES 403 AND 404(B), UTAH RULES OF EVIDENCE.

Evidence of the discussions Hansen had with undercover agents regarding his ability to procure drugs other than those charged as part of the Information was not admissible under Rules 403 and 404(b), Utah Rules of Evidence. The trial court justified the admission of this highly prejudicial evidence on three grounds. First, the trial court ruled that the evidence was relevant to Hansen's intent. R. 223. Second, the court determined that it would be impossible to make sense of the tape if Hansen's statements were redacted. R. 224. The court seemed to be under the inexplicable perception that if those disputed portions of the tape were redacted, other relevant evidence would also be lost. R. 224-25. Third, the court noted that defense counsel had not provided an already redacted tape. R. 224.

Because of its inherent inflammatory potential, evidence of prior crimes is presumed to be inadmissible. State v. Doporto, 308 Utah Adv. Rep. 18, 21 (Utah 1997). Prior to admitting prior bad acts evidence, the trial court must find that:

> (1) there is a necessity for the prior crime evidence, (2) it is highly probative of a material issue of the crime charged, and (3) its special probativeness and the necessity for it outweigh its prejudicial effect.

Id. at 21. Evidence of Hansen's statements was not necessary to the State's case and was not relevant to his intent. Any

marginal probative value the evidence may have had was outweighed by its prejudicial effect.

A. The Other Crime Evidence Was Not Necessary To The State's Case As Required By Rule 404(b).

Doporto made it clear that 404(b) evidence must be necessary. Id. at 22. Necessity is an independent, threshold requirement. Even if the evidence is probative, even if its probative value outweighs its prejudicial effect, the State must show that its admission is essential to establishing its case. This independent requirement prevents the State from gratuitously capitalizing on the highly prejudicial impact of 404(b) evidence. The State must justify its use of 404(b) evidence by establishing that the evidence is indispensable, unavoidable, or that its admission is compelled by the circumstances of the case.

The entire transaction of the sale of cocaine between Walker and the agents was captured on video tape. The State presented evidence that Hansen drove Walker to the office, and knowing that Walker was selling the agents cocaine loaned Walker his car to purchase the drugs, and had some knowledge of Walker's criminal activities. Though Hansen's intent was a central issue, this was not a case built on circumstantial evidence where the State had no means available to establish intent without resorting to 404(b) evidence. Though subject to differing interpretations, the evidence was straightforward. The fact that the State's evidence could be interpreted in different ways does not make its use of 404(b) evidence necessary. Nearly every criminal trial involves factual scenarios that can be explained

in opposing ways. If the mere fact that a given set of circumstances is subject to different interpretations were sufficient to establish necessity, then Doporto would have little meaning.

It is entirely unclear why the trial court thought that redacting these brief conversations would render the entire tape meaningless. All of the aforementioned, admissible evidence would have been presented to the jury in a clear, understandable form. The sequence of events would not have been disrupted. Nor is it clear, why, given the technological ease with which even a few seconds of tape can be redacted, the court thought that other admissible evidence would be lost. Lastly, the court was given a very specific list of the type of evidence the defense was seeking to redact. R. 28-30. The trial court simply did not need a redacted version of the tape to review in order to determine whether the narrow class of evidence at issue was admissible.

B. Evidence Of Hansen's Discussions About His Ability To Procure Other Drugs Was Not Highly Probative Of His Intent To Commit The Charged Offense.

The Doporto court clearly reestablished the once narrow scope of admissible evidence under Rule 404(b). See, e.g., State v. Featherson, 781 P.2d 424 (Utah 1989). Doporto held that 404(b) evidence must be "highly probative of a material issue." 308 Utah Adv. Rep. at 21 (emphasis in the original). "It must be strongly probative of a material issue, a probativeness that cannot serve as a ruse for showing that the defendant's

propensity is such that he is likely to have committed the kind of crime charged." Id. at 22. For example, in Featherson, the State introduced evidence that the day the charged crime occurred, the defendant made nonconsensual sexual advances to two other women as proof of the defendant's intent to commit aggravated sexual assault. Id. at 427. The court held that the defendant's conduct earlier that day was not relevant or probative of his state of mind. Id.

This case is similar to State v. DeAlo, 748 P.2d 194 (Utah Ct. App. 1987). In DeAlo, the defendant was charged with possession of a controlled substance with the intent to distribute. The State introduced evidence that the defendant was under investigation for drug trafficking in another state, and admitted a "dope ledger" in the defendant's handwriting recording drug sales made in California under Rule 404(b) to show intent. Id. at 198-99. The court held that uncharged allegations of drug trafficking which were unrelated to the charged crime had "marginal" probative value on the issue of intent. Id. at 199.

Evidence of Hansen's statements that he had the ability to procure other drugs was not highly probative of his intent to arrange the cocaine deal between Walker and the agents. Hansen's claim that he could obtain LSD and other drugs was not connected to Walker's sale of cocaine to the undercover agents. The statements were made when Walker was gone and did not involve Walker. Hansen's main concern seemed to be finding employment. Then Rasmussen told Hansen to stay while Walker was gone. Hansen

did not mention obtaining drugs until Rasmussen asked him. VT. 10:39. It is questionable that Hansen had the ability or the intent to actually follow through with his claims. The evidence supports the notion that Hansen's statements were merely empty talk. In fact, Hansen never followed through. R. 519, 566. When Garcia called, Hansen retracted his claim that he could get LSD and hung up. R. 562-63.

C. Hansen's Statements Should Have Been Excluded Under Rule 403 Because The Probative Value Was Outweighed By The Prejudicial Effect.

Even if Hansen's statements were admissible under Rule 404(b) they should have been excluded under Rule 403 because the minimal probative value was substantially outweighed by the prejudicial impact of the evidence. "Prior crime evidence has inherent and unavoidable inflammatory potential." Doporto, 308 Utah Adv. Rep. at 21. The Utah Supreme Court has recognized the high risk of unfair prejudice when evidence of uncharged drug offenses is admitted in a drug distribution case. In State v. Bell, 770 P.2d 100, 110-11 (Utah 1988), the defendant argued that evidence of uncharged incidents of drug trafficking should not have been admitted in his trial for racketeering by means of narcotics distribution. After reversing on other grounds, the court noted, "We agree with Bell that this evidence has a high potential for prejudice. It is distinctly possible that this evidence influenced the jury to convict Bell without regard to the strength of the evidence on the crimes actually charged." Id. at 111.

In DeAlo, the court held that evidence of uncharged drug trafficking was inadmissible under Rule 403. Id. at 198-200. Echoing the holding in Bell, the court reversed the conviction because of the high "probability of unfair prejudice and confusion of the issues." Id. Like DeAlo, this case involves evidence of drug activity that is unrelated to the crime charged. Like DeAlo, the evidence of the uncharged activity is not strong. In fact, the evidence of DeAlo's prior drug activity was stronger than Hansen's passing remarks to the undercover agents. And like DeAlo and Bell, there was a high risk that the jury convicted Hansen not on the evidence, but on the belief that he was guilty because he is a person likely to engage in drug sales, and on an impulse to punish him for the uncharged conduct. Hansen's statements should not have been admitted under Rule 403.

D. The Admission Of Hansen's Remarks To The Agents About His Ability To Procure Drugs Was Prejudicial Error.

Hansen was prejudiced by the admission of his remarks to agents about his ability to procure drugs. It is important to note that the mere fact that the jury could have concluded that Hansen was guilty without the improper evidence does not render the error harmless. The central question is whether it can be stated with assurance that the jury was not influenced by the erroneous admission of the evidence. Doporto, 308 Utah Adv. Rep. at 24. In Doporto, the court recognized that the jury could have concluded the victim was telling the truth without hearing the prior crime evidence. But because the court could not conclude

that the jury was uninfluenced by the improper evidence when they assessed the defendant's and the victim's credibility, the error was not harmless. Id.

The jury in this case had to determine whether Hansen arranged the sale of cocaine between Walker and the agents. It is highly likely that the jury was influenced by evidence of Hansen's statements. Upon hearing Hansen's claims that he knew where to buy drugs, the jury could easily have concluded that he was the type of person who distributed drugs, and by virtue of his propensity for this type of behavior, arranged the deal between Walker and the agents. For this reason, the error was not harmless and reversal is required.

CONCLUSION

Appellant Ted Charles Hansen respectfully requests that this Court reverse his conviction for insufficient evidence, or, in the alternative, reverse his conviction and remand this case for a new trial.

SUBMITTED this 10 day of March, 1997.

REBECCA C. HYDE
Attorney for Defendant/Appellant

RICHARD P. MAURO
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, REBECCA C. HYDE, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P. O. Box 140854, Salt Lake City, Utah 84114-0854, this 10 day of March, 1997.

REBECCA C. HYDE

DELIVERED this _____ day of March, 1997.

ADDENDUM A

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. [Citizenship - Due process of Law - Equal protection]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE I, SEC. 7., UTAH CONSTITUTION [DUE PROCESS OF LAW.]

No person shall be deprived of life, liberty or property, without due process of law.

§ 58-37-8. PROHIBITED ACTS--PENALTIES

(1) Prohibited acts A--Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

§ 76-2-202. CRIMINAL RESPONSIBILITY FOR DIRECT COMMISSION OF OFFENSE OR FOR CONDUCT OF ANOTHER

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion,

except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.